

Order 96-12-5

Served: December 9, 1996

**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

**Issued by the Department of Transportation
on the 9th day of December, 1996**

1996/1997 BRAZIL ALL-CARGO CHARTER	:	
PROCEEDING (PHASE II)	:	DOCKET OST-96-1242

ORDER TENTATIVELY ALLOCATING ADDITIONAL CHARTERS

Summary

By this order we tentatively allocate the 300 additional charters available for U.S.-Brazil all-cargo charter operations as follows: Southern Air Transport (SAT)-75 charters, Tower Air-25 charters, and the charter pool-200 charters. We also tentatively decide to modify the charter pool rules to permit new entrant carriers to apply for up to eight flights each month.

Background

Under the U.S.-Brazil Air Transport Agreement, as amended, U.S. carriers have been entitled to operate 450 round trip charters each charter year (July 1 through June 30). By Order 96-7-15, the Department allocated the 450 available charters to six U. S. carriers as follows: Millon Air-102, SAT-81, Tower Air-58, Arrow Air-54, Florida West International Airlines-53, and ABX-20. The remaining 82 charters were reserved in a charter pool for distribution on a first-come, first-served basis.

On October 24, 1996, representatives of the United States and Brazil signed a Memorandum of Consultations (MOC) to amend the U.S.-Brazil Air Transport Agreement. Among other things, the amendments provide that U.S. carriers may operate an additional 300 charters during the 1996/97 charter year and that for each

year thereafter U.S. carriers may operate a total of 750 annual charters.¹ By Notice dated November 1, 1996, the Department solicited applications from U.S. carriers interested in allocation of these flights. The Notice also provided for answers to applications and replies to answers.

Applications²

Nine carriers filed applications seeking a total of 678 charters as follows:

<u>Carrier</u>	<u>Flights Requested</u>	<u>Aircraft</u>	<u>Market</u>
Arrow	50	DC-8 L-1011	Miami/Houston-San Juan- Sao Paulo/Manaus
Atlas	50	B-747	Miami-Sao Paulo
Fine Air	52	DC-8	Miami-Sao Paulo/Manaus/Belem
Florida West	81	DC-8 B-747	Miami-Sao Paulo/Rio de Janeiro/ Manaus/Porte Alegre
Millon	106	B-707 L-1011	Miami-Sao Paulo/Manaus
SAT	150	B-747	Miami-Sao Paulo/Manaus
Tower Air ³	25	B-747	Included in information covered by Rule 39 Motion
TransCon	68	DC-8	Miami-Brasilia/Belem/Cuiaba/ Sao Paulo
USA Jet	96	DC-8 DC-9	Detroit-Sao Paulo/Rio de Janeiro

ABX did not apply for a specific allocation of charters, but rather urges the Department to allocate at least 54 charters (18% of the total available) to the charter pool.

¹ The delegations agreed to recommend to their respective governments that the provisions of the amended agreement set forth in the MOC be applied on the basis of comity and reciprocity pending conclusion of the agreement. See October 24, 1996, Memorandum of Consultations.

² Florida West, Tower, SAT, Millon, and USA Jet filed separate motions under Rule 39 of the Department's regulations seeking confidential treatment of the charter contracts on which their applications are based.

³ Tower's application was filed late and was accompanied by a motion for leave to file. We will grant the motion.

Responsive Pleadings

Answers to the applications were filed by Arrow, Atlas, Fine, Millon, SAT, USA Jet, and the Government of Puerto Rico. Replies were filed by Arrow, ABX, Florida West, Millon, SAT, Tower, TransCon, and USA Jet.

With the exception of ABX, carriers with a history of service in the market (SAT, Millon, Arrow, Tower, and Florida West) generally support allocation of the majority of the charters to incumbent carriers based on their proven record of successful operations, with some charters reserved in the charter pool for new entrants. New entrant applicants (Fine, TransCon, Atlas, and USA Jet) generally support a distribution that would favor new entrant airlines in order to promote competition in the market.

In addition, wide-body aircraft applicants support allocation to carriers using wide-body aircraft on the argument that it provides the market with greater capacity. Narrow-body aircraft applicants contend that operators of narrow-body aircraft also meet needs of the market as has been previously recognized by the Department and, thus, should also be allocated flights. Some carrier applicants also argue that applicants without firm contracts should not be allocated any flights.

ABX supports expansion of the charter pool by at least 54 flights and states that no party to the proceeding has opposed that request. It further states that an expanded charter pool would facilitate new entry and provide a means for carriers that do not have firm plans for all of the flights they seek in this proceeding to serve the market when plans are finalized without jeopardizing the operations of carriers that already have firm contracts for their services.

With respect to specific carrier applications, several applicants argue that Millon Air should not be allocated any additional flights. They assert the Federal Aviation Administration had required Millon to cease flight operations, and thus, that Millon would not be eligible for an award until it has again been found fit by the Department under Part 204 of the Department's regulations. Millon replied that it ceased operations voluntarily and intends to resume operations within 30 days after the FAA completes its review of the carrier's operations following its accident in Ecuador in October. Millon argues that since it continues to operate under wet-lease arrangements with other U.S. carriers, it has not ceased operations and does not require an additional fitness determination, and therefore, is eligible for an additional award in this case.

With respect to USA Jet, several applicants (both wide-body and narrow-body aircraft operators) argue that USA Jet should not be allocated any flights because it does not have a history of operations in the market, will serve only one customer, and proposes service with the smallest available capacity of any of the applicants in this case. USA Jet replies that the fact that it has only one charterer should not be relevant, that the

needs of its customer, an automotive shipper, should not be subordinated to those of other shippers, and that contrary to the allegations of the other carriers, the needs of the automotive industry have not been met adequately, which is why USA Jet has applied in this case.

Fine argues that new entrants cannot develop truly competitive services with access only to the charter pool. Fine urges the Department to allocate the majority of charters now and impose conditions that would require carriers that have not operated a pro rata portion of their allocation during each two month period to forfeit a percentage of their allocation to prevent waste of the charters.

The Government of Puerto Rico supports any applicant that proposes service to Puerto Rico.

Decision

We have tentatively decided to allocate 100 of the 300 available charters to SAT (75) and Tower (25), and to put the remaining 200 charters in the charter pool for distribution on a first-come, first-served basis. In this regard, we also propose to amend the existing charter pool rules to permit new entrant carriers to apply for up to eight flights per month (an increase from four per month under the existing rules).⁴

In allocating Brazil all-cargo charters we have had three major objectives--to ensure that the flights are fully used, to satisfy to the extent possible needs of shippers and carriers in the market, and to ensure that all carriers, incumbent and new entrants, have access to the market. The additional 300 flights made available under the MOC provide valuable new opportunities for U.S. carriers. While we have historically given some preference to incumbent carrier operations, given the large number of additional flights now available, we tentatively conclude that the public interest is best served if we use a significant portion of the newly available flights to provide opportunities for new entrants to offer competitive services in the market. That said, we also recognize that incumbent carriers have served the market well and in many cases were not able to obtain sufficient flights in the initial proceeding to accommodate their contracted operations. Thus, we also tentatively conclude that a portion of the available flights should be used to facilitate additional operations by incumbent carriers. Against this background, we have tentatively decided to use 200 of the available flights to facilitate operations by new entrant carriers and the remaining 100 flights for incumbent carrier services.

A. New Entrant Services

⁴ A new entrant airline is defined as a U.S. carrier that was not granted an allocation of flights by Order 96-7-15 or in this proceeding; an incumbent carrier is a carrier that has been allocated flights by Order 96-7-15 or in this proceeding. Carriers authorized to provide scheduled all-cargo services in the market will continue to be limited to allocation of four monthly flights when they are otherwise eligible to use the charter pool as provided for in Order 96-7-15, ordering paragraph 3.(b).

The new entrant applicants in this proceeding--Atlas, Fine Air, TransContinental, and USA Jet--urge us to use the additional flights to allocate them blocks of flights to inaugurate competitive services in the Brazil market. While we appreciate the desire of new entrants for advance allocations, our recent experience, which has included some of the same carriers that have applied in this proceeding, has demonstrated that advance allocations to such carriers has resulted in a significant level of waste of the flights even where carriers have presented what appeared to be firm contracts for their services.⁵ Therefore, rather than allocate to these carriers a specific number of flights, we have decided to put the 200 flights in the charter pool and to revise the charter pool rules to permit new entrant carriers to apply for up to eight flights per month, rather than to limit such charters to four as currently provided. Flights not operated each month would automatically revert to the charter pool and be available to other carriers. Given the large number of flights in the charter pool (200 plus the existing 42 flights=242 flights), this will provide carriers and shippers significant confidence that carriers will have access to the flights necessary to operate, while at the same time ensuring that the flights will not be wasted and will be available to other carriers that have firm plans to use them without the delay that would result from more extensive forfeiture provisions.

B. Incumbent Carrier Services

In our initial allocation of the 450 available flights we allocated the majority to carriers that had a history of successful operations in the market, thereby demonstrating their ability to use the available flights effectively. Of the carriers allocated flights, SAT has operated its full allocation and Tower Air has operated over 50 per cent of its allocation. On the other hand, with the exception of Millon, which we discuss below, the other three carriers allocated flights in the initial proceeding have operated very few flights and, thus, have the majority of their allocations available for continued operations during the charter year.⁶

Given the use by SAT and Tower, and the fact that both have demonstrated a need for additional flights to support their existing services, we have tentatively decided to allocate the 100 charters for incumbent carrier operations between these carriers to facilitate their continued services in the market. We have tentatively decided to allocate Tower 25 flights and SAT 75 flights. Tower has sought only a limited number of flights to supplement its services, a request we believe overall is reasonable given the pattern of its services and that approval will facilitate continued operations by the carrier through the balance of the charter year.⁷ Similarly, the 75 flights to SAT will

⁵ Order 96-6-43 at 5.

⁶ Through October, Florida West operated 18 of its 52 flights, Arrow 9 of its 54 flights, and ABX 3 of its 20 flights.

⁷ Tower has operated an average of slightly less than eight flights per month during the first quarter of the charter year (through October). The balance of its allocation together with the additional allocation will enable it continue this same level of service.

significantly increase its allocation making it possible for the carrier to continue a high frequency of service to its customers. While we recognize that SAT sought more flights, we are not prepared to allocate half of the total number of additional flights available to one carrier as SAT requested. To do so would detract from our ability to achieve the combination of policy objectives, cited above, guiding our allocation decision. Furthermore, as discussed below, the charter pool rules provide that incumbent carriers such as SAT may obtain flights from the charter pool beginning in January 1997. Thus, SAT will have access to additional flights from the charter pool to supplement its operations.

We note that Millon also operated a substantial number of its allocated flights, and thus might otherwise be considered for allocation of some of the additional flights. However, as noted by several of the parties to this case, in October Millon ceased operations with its own aircraft. Although the Department had permitted Millon to continue its air carrier services for a short period under wet leases, by letter dated December 6, 1996, the Department notified Millon that it has determined that the carrier has effectively ceased air carrier operations within the meaning of Part 204 of the Department's regulations, and that it may not resume operations, including operations conducted under wet leases, until such time as the Department has redetermined that it is fit to do so. As Millon no longer holds effective authority to operate charters, it is not eligible for an allocation in this case.⁸

Arrow and Florida West, the only other eligible incumbent carriers seeking an allocation in this proceeding, have a large number of flights remaining in their initial allocations and will have access to the charter pool beginning January 1, 1997, as do the other incumbent carriers, and will be able to apply for up to four additional flights per month to supplement their operations. In this regard, however, we expect that carriers allocated flights will use their allocations before they seek flights from the charter pool. While we do not propose to change the basic nature of the charter pool from a first-come, first-served system, should flights from the charter pool be used more quickly than we anticipate, we intend to give preference to applications from new entrant carriers as opposed to incumbent carriers, particularly if the incumbent carrier has not used a significant portion of its allocation.

As stated above, a major objective in our allocation of Brazil charters is to ensure that the available flights are used fully. Therefore, in addition to the specific allocations to incumbents, we also propose to amend our charter pool rules to permit incumbent carriers to seek up to eight flights per month once they have operated 75 per cent or

⁸ We note that Millon also has additional flights remaining in its initial allocation (as of October 31, Millon had operated 74 of the 102 flights it had been allocated). We will continue to monitor Millon's status. Should it appear that the carrier will not resume operations in a reasonable period of time, and should the carrier not have voluntarily relinquished its allocation, we will take steps at that time to withdraw the balance of its allocation and place the flights in the charter pool so that they will be available to other carriers. Should Millon again be found fit and resume operations, it will be able to continue its services in the market by obtaining flights from the charter pool. However, we will not entertain applications from Millon for charters until its fitness is reestablished.

more of their existing allocations. This will ensure that these carriers fully use their allocations while still permitting them to expand their operations should additional flights be necessary to continue their services in the market. By restricting the incumbent carrier access to the eight-flight-per-month distribution until they have used the substantial majority of their allocations, we seek to ensure that incumbent carriers do not deplete the charter pool while retaining their own allocations, and we thereby act to safeguard the opportunity for competition in the market from new entrant carriers.

We are not persuaded by arguments that incumbent carriers should not be allocated a sizable portion of the available flights. These carriers have experience in serving the market, a demonstrated history of successful use of their allocations, and a demonstrated demand for their services. Given our desire to ensure full use of the flights and to ensure that incumbent carriers can continue their operations, we believe that the public interest is well served by allocating a portion of the available new opportunities to facilitate the operations of incumbent carriers.

We are also not persuaded by arguments that wide-body applicants should be given preference to other applicants and that USA Jet should be excluded from the market because of the size aircraft it proposes to operate. As we have stated previously, we believe that the U.S.-Brazil charter market is best served by a mix of aircraft routings and services and that such a mix will best meet the spectrum of needs of the market.⁹

Reporting Requirements

Finally, we remind incumbent and new entrant carriers of the specific reporting requirements attached to their allocations and to notices of consistency for flights distributed from the charter pool. Incumbent carriers must file a monthly report specifying the number of flights operated, together with other information set forth in Order 96-7-15. Carriers operating from the pool must report no later than the tenth day of the following month, notifying the Department how many of the flights approved by the notice were operated. This information is essential in determining the level of services operated by incumbents and ensuring that flights not operated under notices of consistency are returned to the pool and made available to other carriers. Given the importance of this information, we put all carriers (incumbent and new entrant) on notice that failure to adhere to the reporting requirements could adversely affect consideration of their future applications for flights from the charter pool.

Motions for Confidential Treatment

Florida West, Millon, Tower, SAT, and USA Jet have filed Rule 39 motions for confidential treatment of their contracts and other specific charter documents submitted in this docket. We have reviewed the documents under the disclosure guidelines of Rule 39 and have determined that they warrant confidential treatment.

⁹ See, for example, Order 96-6-43 at 7.

Because of the commercially sensitive nature of the information in these documents including the names of charterers and various contractual details, we have determined that the documents fall within the Freedom of Information Act exemption for proprietary information and would adversely affect the competitive position of an air carrier in foreign air transportation under 49 U.S.C. section 40115.

ACCORDINGLY,

1. We tentatively allocate the 300 additional charters for U.S. carrier U.S.-Brazil all-cargo services as follows:

Southern Air Transport	75
Tower Air	25
Charter Pool	200
Total	300

2. We amend ordering paragraph 3(a) of Order 96-7-15 to read as follows:

3.(a) Distributions will be made to eligible applicants on a first-come, first-served basis with operations under such distributions limited to eight per calendar month for each new entrant applicant; and four per month for each incumbent carrier applicant until such time after January 1, 1997, that the incumbent has operated 75 per cent or more of its total allocated flights at which time it may apply for up to eight flights per month;¹⁰

3. We grant the motion of Tower Air, Inc. for leave to file a late application;¹¹

4. We direct all interested parties objecting to the tentative decisions described in this order to file an original and 5 copies of their objections with the Department, Dockets, Docket OST-96-1242, U.S. Department of Transportation, 400 Seventh Street, S.W., Room PL-401, Washington, D.C. 20590, no later than December 16, 1996; answers to such objections shall be filed no later than December 19, 1996;¹²

¹⁰ Under the provisions of Order 96-7-15, ordering paragraph 3(b), carriers authorized to provide scheduled all-cargo services in the U.S.-Brazil market are not eligible to obtain flights from the charter pool until after April 30, 1997, and may apply for no more than four flights in any one calendar month. We make no changes to the charter pool provisions as they apply to these scheduled carriers.

¹¹ Although SAT opposed Tower Air's motion, we are unpersuaded that accepting Tower Air's application prejudiced any party to this proceeding.

¹² The original submission is to be unbound and without tabs on 8½" X 11" white paper using dark ink (not green) to facilitate use of the Department's docket imaging system. Parties may serve their pleadings on other parties by facsimile. The certificates of service attached to the pleading should make clear whether service was made by facsimile, by hand, or by first-class mail.

5. If timely and properly supported objections are filed, we will accord full consideration to the matters or issues raised by the objections before we take further action;¹³

6. In the event that no such objections are filed, we will deem all further procedural steps to be waived and we will enter an order finalizing our tentative allocations and procedures;

¹³ As we are providing for answers to this tentative decision, we will not entertain petitions for reconsideration of our tentative allocations in this order.

7. We grant all motions for confidential treatment filed by the parties in this case; and
8. We will serve ABX Air, Inc; Arrow Air, Inc; Atlas Air, Inc.; Fine Air, Inc.; Florida West International Airlines, Inc.; Millon Air, Inc.; Southern Air Transport, Inc.; Tower Air, Inc.; TransContinental Airlines, Inc.; USA Jet Airlines, Inc.; the Government of Puerto Rico; the Ambassador of Brazil in Washington, D.C., and the U.S. Department of State (Office of Aviation Negotiations).

By:

PATRICK V. MURPHY
Deputy Assistant Secretary for
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(SEAL)